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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 572

SIDNEY LEFKOWITZ and
ROSE LEFKOWITZ,

Petitioners,

v.

LAURIE W. TOMLINSON, DISTRICT DIRECTOR
OF INTERNAL REVENUE FOR THE
DISTRICT OF FLORIDA,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OF INTERNAL REVENUE FOR THE
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Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit affirming in part the Judgment of the United States District Court for the Southern District of Florida, holding that the petitioners were collaterally estopped from seeking a refund of income tax fraud penalties.

OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix A) has been officially reported at 334 F.2d 262. The Opinion of the District Court has been officially reported at 173 F. Supp. 932 (Appendix B).

JURISDICTION

The Opinion of the Court of Appeals was entered on July 13, 1964. Judgment on the Mandate was issued on August 4, 1964, (Appendix C). The Judgment on the Mandate was withdrawn pending the filing of a Petition for Writ of Certiorari, (Appendix D). The Mandate was further stayed until November 1, 1964, (Appendix E). The jurisdiction of this Court is invoked pursuant to Title 28 United States Code Section 1254(1).

QUESTION PRESENTED

Are a husband and wife collaterally estopped from seeking a refund of income tax fraud penalties because the husband had theretofore been convicted of income tax evasion for the same taxable years?

STATUTES INVOLVED

The following Statutes are involved herein:

1. Section 145(b) of the Internal Revenue Code of 1939, to-wit:

> "Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required un-

der this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

2. Section 293 (b) of the Internal Revenue Code of 1939, to-wit:

"Fraud. If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2). 53 Stat. 88."

STATEMENT OF THE CASE

The petitioners sued the District Director of Internal Revenue for the District of Florida, claiming a refund for income tax fraud penalties assessed and collected pursuant to Section 293(b) of the Internal Revenue Code of 1939 as follows:

1951	$ 8,975.68
1952	6,866.08
1953	8,128.57
Total	$23,970.33

The District Director of Internal Revenue having the burden of proof defended against the claim by introducing into evidence over objection a certified copy of an indictment and the Judgment and Commitment of the petitioner, SIDNEY LEFKOWITZ, showing that the petitioner, SIDNEY LEFKOWITZ, had been convicted of violating Section 145 (b) of the Internal Revenue Code of 1939, for the same taxable years. No other evidence was offered. The pleadings limited the issue to the doctrine of collateral estoppel. The matter came on for a non-jury trial before the Honorable David W. Dyer, Chief Judge for the Southern District of Florida, who ruled that both petitioners were collaterally estopped from seeking a refund of the fraud penalties. The Court of Appeals for the Fifth Circuit affirmed this decision.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

The basic issue of whether a taxpayer who has been convicted for tax evasion is collaterally estopped from seeking a refund of fraud penalties is one effecting litigation in all judicial districts and the Tax Court of the United States, which is in conflict with the Opinion below. *Meyer J. Safra*, 30 T.C. 1026 (1958). *James V. Sclafani*, T.C. Memo 1963-298.

The subsidiary issue of whether the wife who joins in a delinquent, but accurate income tax return is liable for fraud penalties attributable to the husband's earlier actions is in conflict with the decisions of other Courts of Appeals. *Cirillo v. Commissioner*, 314 F. 2d, 478 (C.A. 3, 1963) and *Spanos v. United States*, 323 F. 2d, 108 (C.A. 4, 1963).

Although the statutes involved relate to the Internal Revenue Code of 1939, the statutory language is identical in all respects with the provisions of the Internal Revenue Code of 1954, and, therefore, will affect current litigation.

The United States District Court for the Western District of Virginia, has ruled diametrically opposite to the opinion below. *United States v. Moore*, 64-2 U.S.T.C. 9717. Upon information and belief, the United States will appeal this decision to the Court of Appeals for the Fourth Circuit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted, or in the alternative, to stay a ruling on the same pending the appeal and decision in the case of *Moore v. United States, supra.*

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I hereby certify that three true copies of the foregoing Petition for Writ of Certiorari have been served upon the following at the addresses indicated: Solicitor General of the United States, Department of Justice, Washington 5, D. C., Louis F. Oberdorfer, Assistant Attorney General, Department of Justice, Washington 25, D. C., and the United States Attorney, Federal Building,

Miami 32, Florida, by United States air mail postage prepaid to the Washington Addresses and by United States mail postage prepaid to the Miami addressee this ____ day of October, 1964.

E. DAVID ROSEN

APPENDIX A

OPINION BELOW

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 21094

LAURIE W. TOMLINSON, District Director of Internal Revenue for the District of Florida,

Appellant-Appellee,

versus

SIDNEY LEFKOWITZ and ROSE LEFKOWITZ,

Appellees-Appellants.

(AND REVERSE TITLE)

Appeals from the United States District Court for the Southern District of Florida.

(July 13, 1964.)

Before TUTTLE, Chief Judge, BROWN, Circuit Judge, and BREWSTER, District Judge.

TUTTLE Chief Judge: This case is before us on cross-appeals of taxpayers Sidney and Rose Lefkowitz and the District Director of Internal Revenue to the judgment of the trial court in taxpayers' refund suit. At issue are

certain penalties assessed against taxpayers under the Internal Revenue Code of 1939, for civil fraud, §293(b), for delinquent failure to file returns, §291(a), for substantial underestimation of estimated taxes, §294(d)2, and for the interest thereon, covering the taxable years 1951-1953.

On March 14, 1958, taxpayers filed skeleton income tax returns for the years 1951, 1952, and 1953 showing only net income and tax. The taxpayers then filed original tax returns for the years in question showing details of income, deductions, credits, and exemptions April 29, 1958. The Government on December 4, 1959, made a further assessment for taxes due in the year 1951.[1] These amounts plus delinquency penalties and interest were paid by taxpayers and no claim for refund of them was made. However, additional penalties assessed by the District Director and paid by taxpayers are the subject of this refund suit. These penalties include $23,970.33 for fraud for the three years, $654.23 for underestimation in 1953, and additional delinquency penalties of $2,491.25 assessed on the ground that the delinquency penalty should be computed without regard to the estimated tax payments made by taxpayer prior to the due dates of his tax returns for the taxable years in issue. The district court held that all of the penalties were properly assessed and collected, except for the civil fraud penalties which should have been computed

[1]The foregoing amounts, along with the declaration and payments made on or near the years in question, are shown in the following table:

Taxable Year	Date Filed and Paid	Amount	3/14/58 Skeleton Return	4/14/58 Return	Additional Assessment
1951	3/15/51	$1,000.00	$ 6,869.28	$11,318.44	$6,632.92
1952	3/15/52	3,615.05	13,623.58	13,772.16	
1953	1/29/54	5,350.00	15,981.41	17,412.52	

with regard to a credit given for the estimated tax payments made by taxpayers before the due date of the return.

The major issue raised on this appeal is whether the lower court correctly held that the criminal conviction of Sidney Lefkowitz for felonious evasion of income taxes in the years in question collaterally estopped taxpayers from seeking a refund of civil fraud penalties assessed for the same taxable years. Taxpayers complain first that the felonies for which the husband was convicted occurred before the wife signed the delinquent joint income tax returns; hence any fraud of the husband during that period should not be imputed to the wife. Secondly, taxpayers argue that the doctrine of collateral estoppel by judgment was improperly invoked since the necessary elements in a prosecution under Internal Revenue Code of 1939, §145(b),[2] under which the husband was convicted, differ from those required to impose a fraud penalty under §293(b).[3]

This Court made a thorough analysis of collateral estoppel in *Hyman v. Regenstein*, 258 F.2d 502, 509-11 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959). The

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[2] "*Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat only tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

[3] "*Fraud.*—If any part or any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2)."

general principle was stated to be that "a fact decided in an earlier suit is conclusively established between their parties and their privies, provided it was necessary to the result in the first suit." *Id.* at 510. In setting the limits of its application, the Court observed, in reliance upon Restatement, Judgements §68(o),(p), that only facts essential to the judgment, as opposed to the evidentiary facts on which the facts in issue depend, are subject to collateral estoppel. See *id.* at 510-11. Once the issue is actually determined, however, it cannot be relitigated between the parties even in a suit on a different cause of action. See *United States v. Burch*, 294 F.2d 1, 5 and n. 4 (5th Cir. 1961). Moreover, an issue resolved in favor of the United States in a criminal prosecution may not be contested by the same defendants in a civil suit brought by the Government. *Local 167, Int'l Bhd. of Teamsters v. United States*, 291 U.S. 293 (1934); see *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568-69 (1951). The converse is not true, however; the Government is not estopped to raise in a civil proceeding an issue on which it lost in a criminal case because the burden of proof beyond a reasonable doubt is greater than in a civil case. *Helvering v. Mitchell*, 303 U.S. 391 (1938); see *United States v. Burch, supra* at 3. Since, in the case at bar, the issue on which collateral estoppel was invoked was one on which the Government succeeded, there can be no objection that the former case was a criminal one whereas this one is civil.

We thus come to the critical question whether a criminal conviction for willfully attempting to evade a tax necessarily carries with it a determination that the

resulting deficiency was due to fraud with intent to evade the tax. Taxpayers argue that it does not, primarily on the basis of two Tax Court decisions, *Meyer J. Safra*, 30 T.C. 1026 (1958), and *Eugene Vassallo*, 23 T.C. 656 (1955). In both of these cases the Tax Court found that a criminal conviction for willfully attempting to evade did not work an estoppel on the issue of fraud in a suit on the civil penalty; this conclusion was reached because of certain language in *Helvering v. Mitchell*, *supra* at 404-05 and n. 14. We do not believe that the Supreme Court's language in that case justifies such an interpretation. As indicated above, the Court held that there could be no estoppel on the question of fraud in a civil case resulting from an acquittal in a criminal case because of the different standards of proof involved. The Government had also objected that estoppel was inapplicable because of the difference in the issues presented, but the Court expressly stated, "Since there was not even an adjudication that Mitchell did not willfully attempt to evade or defeat the tax, it is not necessary to decide whether such an adjudication would be decisive also of this issue of fraud." *Id.* at 398. The language on which the Tax Court relied and which taxpayers here claim is decisive is found in a discussion of double jeopardy in which the Court concluded that the 50% fraud penalty is actually a civil sanction and ,therefore, Mitchell was not put in double jeopardy. In a footnote, *id.* at 404 n. 14, the Court quotes language from the Board of Tax Appeals in the same case, to the effect that the civil and criminal sections are basically different in character and contain widely differing language which may require entirely dissimilar proof, to aid in distinguishing the nature of the two sections. We do

not think this constitutes a recognition by the Supreme Court that a finding of fraud is not necessary to convict under section 145(b). Likewise, the case of *United States v. Scharton*, 285 U.S. 518 (1932), which held that a proviso extending to six years the statute of limitations on tax cases where fraud was involved did not apply to a willful attempt to evade a tax, does not control the question before us because the Court noted that required narrow construction of the proviso limited it to offenses where fraud was defined as an ingredient in the statute. See *id.* at 521-22.

We conclude that the term "willfully," as used in section 145(b), must necessarily include the elements of "fraud," as used in section 293(b). The term "willfully" as it is used in the criminal statute is "a specific intent involving the bad purpose and evil motive to evade or defeat the payment of . . . income tax." *Bloch v. United States*, 221 F.2d 786, 789 (9th Cir. 1955); see *Wardlaw v. United States*, 203 F.2d 884, 885, (5th Cir. 1953). On the other hand, the fraud necessary for the imposition of the 50% penalty is a specific purpose to avoid a tax known to be owing. See *Powell v. Granquist*, 252 F.2d 56, 60 (9th Cir. 1958). Or, as this Court has said, there must be "actual and intentional wrongdoing on the part of the [taxpayer] . . . with a specific intent to evade the tax." *Eagle v. Commissioner*, 242 F.2d 635, 637 (5th Cir. 1957); see *Mitchell v. Commissioner*, 118 F.2d 308, 310 (5th Cir. 1941). From examining the components of the two it can readily be seen that "willful" includes all the elements of "fraud." The difference, if any, is in the greater degree of bad motive or evil purpose required

under the criminal provision; both require a wrongful intent to deprive the Government of taxes owing it.

Other courts, in another context, have also found fraud to be present in the willful attempt to evade taxes described in section 145(b). In deportation cases, the Supreme Court has established that fraud is the ingredient which makes a crime one involving moral turpitude as the term is used in the immigration laws. See *Jordan v. DeGeorge*, 341 U.S. 223, 227-29 (1951). Applying this test the Ninth Circuit has held that a conviction under section 145(b) for willfully attempting to evade taxes was one involving fraud, and hence an alien convicted under 145(b) could be deported. *Tseung Chu v. Cornell*, 247 F.2d 929 (9th Cir. 1957). In addition a district court in a similar situation has said:

> "[T]he Courts have, with apparent unanimity, held that in order for a conviction under §145(b) to stand, the Government is required to prove that the evading taxpayer had a specific intent to evade taxation, *amounting to an intent to defraud the United States.* Fraud is so inextricably woven into the term, 'wilfully' as is employed in §145(b), that it is clearly an ingredient of the offense proscribed by that section. Only by creating unwarranted semantic distinctions could a contrary conclusion be reached."

Chanan Din Khan v. Barber, 147 F.Supp. 771, 775 (N.D. Cal. 1957), *aff'd*, 253 F.2d 547 (9th Cir.), *cert. denied*, 357 U.S. 920 (1958). We therefore find that the issue

of the existence of a fraudulent intent is foreclosed by collateral estoppel arising from Sidney's conviction under section 145(b). Since it is not challenged that deficiencies existed for the years 1951-1953, we hold that imposition of the section 293(b) fraud penalties is proper.

Mrs. Lefkowitz contends here for the first time in this litigation that she is somehow in a better position than is her husband with respect to her right to recover the fraud penalties assessed against the couple. This contention is based on the theory that since there is no proof that Mrs. Lefkowitz participated in the fraud of which her husband was found guilty in the criminal case, the right to recover for the fraud penalty would be available to her. There is no merit in this contention. In the first place, this contention was not made in the trial court. The parties agreed by stipulation at a pretrial conference what issues of fact and law were to be decided by the trial court. This point was not included in those issues remaining open for consideration. Thus the appellant should not be permitted to raise the issue here for the first time. Moreover, we conclude that if the issue had been raised there would be no merit in the contention. Here there was a fraud penalty paid by the taxpayers on account of a proven violation of the civil fraud penalty section of the Code, §293(b). The wife has made no effort to show that the payment of the fraud penalties was made with her funds as distinguished from those of her husband. In a suit for refund she can not be permitted to recover payments which she has neither alleged nor proved that she has made.

There are three remaining issues touching on the

method of applying the several penalty provisions of the 1939 Code. The first of these deals with determining the "deficiency" as to which the 50% penalty is to be applied. The taxpayer here filed estimates accompanied by payments during the years 1951, 1952, and 1953. However, they made no timely return for any one of those three years. While the payments made with the declaration and estimate were fairly substantial they were much less than the amount of taxes finally assessed for the three years involved. The taxpayers here contend that the "deficiency" as to which the 50% penalty is to be applied, must be reduced by the amount of taxes actually paid with the declaration and estimate for each of three years, whereas the District Director contends that the deficiency is to be computed upon the entire amount of the tax ultimately found to be due for each of the three years because no return was filed for any of the three years until 1958. The trial court decided this issue with the taxpayer. It appears to us that the provisions of the statute relating to the civil fraud penalty require us to reverse this conclusion. Taxpayers do not in their briefs filed in this Court give any support to the trial court's determination in this respect. Section 271 of the 1939 Code provides in essential part:

> "(a) In General.—As used in this chapter in respect of a tax imposed by this chapter, 'deficiency' means the amount by which the tax imposed by this chapter exceeds the excess of—
>
> (1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was

shown as the tax by the taxpayer thereon, . . . "

It is undisputed that here no amount was "shown as the tax by the taxpayer upon his return" because he filed no return, although he did file a declaration and estimate of the tax for each of the three years involved. It is clear from other provisions of the Code that the law distinguishes between the tax return and the declaration and estimate of the tax. Thus, the definitional terms of the statute seem to preclude the granting of the relief which the trial court afforded the taxpayers in crediting the amount shown upon the declaration and estimate as a reduction of the deficiencies for the three years involved.

The second of the penalty section, section 291(a), the penalty for the delinquent failure to file a tax return when due was, we conclude, correctly construed by the trial court. We agree that, as held by the Tax Court in *West Virginia Steel Corp. v. Commissioner*, 34 T.C. 851, the delinquency penalty must be computed not on the net amount due by reason of payments made on the declaration, but on the entire tax where there is a failure to file a timely income tax return. We think it clear that the provisions now contained in the section 6651(b) of the Internal Revenue Code of 1954 marked a change in this requirement.

We also affirm the action of the trial court with respect to the third challenged penalty. The issue here arises because the District Director assessed a delinquency penalty both for failing to file an estimate for the year 1953, and for thereafter filing an estimate which was a substan-

tial under-estimation of the tax. The cases clearly authorize this treatment. See *Bryan v. Commissioner*, 281 F.2d 238, (4th Cir. 1960). *Stellor v. United States* (Ct. Claims 1961), 287 F.2d 588.

The judgment is MODIFIED to the extent that it allowed a recovery by the taxpayers of the sum of $4,982.52, plus interest, by reason of the credits allowed against the deficiencies for the years 1951, 1952, and 1953 in computing the fraud penalty. In all other respects the judgment of the trial court is AFFIRMED. The case is REMANDED to the trial court for the entry of a proper judgment in accordance with this opinion.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CIVIL ACTION NO. 11,253-M-DD

SIDNEY AND ROSE LEFKOWITZ,
Plaintiffs,

vs.

LAURIE W. TOMLINSON, DISTRICT DIRECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed December 26, 1962, Miami Division, U. S. District Court, Southern District of Florida.

This cause came on to be heard by the Court without a jury and upon the entire file and facts agreed to by the parties the Court makes the following:

Findings of Fact

I.

This is an action for the recovery of fraud penalties, delinquency penalties, and estimated tax penalties paid by the plaintiffs to the defendant for the years 1951

through 1953. The Court has jurisdiction of this matter under 28 U.S.C., Section 1340.

II.

A. The plaintiffs are husband and wife, and residents of Miami Beach, Florida, in the Southern District of Florida.

B. The defendant is the District Director of whom the subject taxes were paid.

C. Venue is proper and this suit is timely.

III.

Tax Liability

A. The total tax liability of the plaintiffs (as of the due date of the return), assessed by the defendant and paid by the plaintiffs, is as follows:

Taxable Year	Liability	Due Date
1951	$17,951.36	March 15, 1952
1952	13,722.16	March 15, 1953
1953	16,257.14	March 15, 1954

B: The details respecting payment are set forth below:

	1951	1952	1953
1. Estimated tax payments (see paragraph IV for dates)	$ 1,000.00	$ 3,615.05	$ 5,350.00
2. On or about March 14, 1958	5,869.28	10,008.53	10,631.41
3. April 29, 1958	4,449.16	148.58	1,431.11
4. December 4, 1959	——	——	(1,155.38)
5. December 11, 1959	6,632.92	-0-	-0-
	$17,951.36	$13,772.16	$16,257.14

As indicated in the above tabulation, a credit of $1,155.38 was allowed by the defendant to the plaintiffs for the year 1953, because of an overpayment in that year. The above payments (with the exception of the estimated tax payments) were accompanied by additional payments representing interest. Interest payments are not tabulated herein.

IV.

ESTIMATED TAX PAYMENTS

With respect to the taxable years 1951, 1952 and 1953, the plaintiffs filed a declaration of estimated tax and made payments thereon upon the following dates and in the following amounts:

Taxable Year	Date Filed and Paid	Amount
1951	3/15/51	$1,000.00
1952	3/15/52	3,615.05
1953	1/29/54	5,350.00

V.

FILING OF INCOME TAX RETURNS

A. On or about March 14, 1958, the plaintiffs filed skeleton income tax forms on Forms 1040 for the taxable years 1951 through 1953, which did not disclose any details indicating sources of income and deductions but which included the following amounts:

	1951	1952	1953
Net Income	$25,587.89	$37,674.91	$40,797.50
Tax	6,869.28	13,623.58	15,981.41

B. On April 29, 1958, the plaintiffs filed with the defendant their original income tax returns on Form 1040 for the taxable years 1951 through 1953, which disclosed details of income, deductions, credits and exemptions and the following tax:

	1951	1952	1953
Tax	$11,318.44	$13,772.16	$17,412.52

C. On December 4, 1959, the defendant assessed further taxes against the plaintiffs in the sum of $6,632.92 for the taxable year 1951.

D. The defendant did not assert any further taxes for the years 1952 and 1953.

VI.

FIRST ASSESSMENT OF DELINQUENCY PENALTIES

A. Subsequent to April 29, 1958, and prior to April 24, 1959, there were assessed against the plaintiffs delinquency penalties, pursuant to Section 291(a) of the Internal Revenue Code of 1939, for the taxable years as follows:

December 31, 1951	$2,579.61	
December 31, 1952	2,539.28	
December 31, 1953	3,015.63	(later reduced to $2,726.79)

On April 24, 1959, the plaintiffs paid to the defendant the aforementioned penalties totalling $8,134.52, plus ac-

crued interest thereon of $176.08. On December 4, 1959, a credit of $288.84 was allowed with respect to the penalty for 1953, because of the credit to tax shown in paragraph III B, above.

B. In addition, on December 4, 1959, the defendant assessed against plaintiffs a further delinquency penalty of $1,658.23 for the taxable year 1951, which the plaintiffs paid on December 11, 1959.

C. The plaintiffs have abandoned their claim with respect to the penalties set forth in this paragraph.

VII.

FRAUD PENALTIES

A. On December 4, 1959, the defendant assessed against the plaintiffs the 50% fraud penalty under Section 293(b) of the Internal Revenue Code of 1939, for the taxable years 1951, 1952 and 1953, in the following amounts:

1951	$8,975.68
1952	6,866.08
1953	8,128.57

The plaintiffs paid these penalties on December 11, 1959.

B. The fraud penalties were computed by the defendant on the total tax as shown in paragraph III A.

VIII.

PENALTY FOR FAILURE TO FILE ESTIMATED TAX RETURNS

On December 4, 1959, the defendant assessed against the plaintiffs the penalty for failure to file timely estimated tax returns under Section 294(d)(1)(3) of the Internal Revenue Code of 1939, for the taxable years 1951, 1952 and 1953, in the following amounts:

1951	-0-
1952	$1,239.48
1953	1,463.15

The plaintiffs paid these penalties on December 11, 1959. The defendant has acknowledged that the penalty for 1952 was erroneously assessed, and that plaintiffs are entitled to a refund thereof in the sum of $1,239.48, with interest as provided by law. The plaintiffs abandoned their claim with respect to the above penalty for 1953.

IX.

PENALTY FOR SUBSTANTIAL UNDERESTIMATION OF ESTIMATED TAX

On December 4, 1959, the defendant assessed against the plaintiffs the penalty for substantial underestimation of estimated tax pursuant to Section 294(d)(2) of the

Internal Revenue Code of 1939, for the taxable years 1951, 1952 and 1953, in the following amounts:

1951	$1,017.08	
1952	826.32	(later reduced to $609.43)
1953	654.23	

On March 10, 1961, a credit was allowed against the penalty for the taxable year of 1952 in the amount of $216.89. The plaintiffs paid these penalties on December 11, 1959. The plaintiffs abandoned their claims to the penalties as to the years 1951 and 1952 only.

X.

FIRST CLAIMS FOR REFUND

A. On March 9, 1960, the plaintiffs filed timely claims for refund for the taxable years ended December 31, as follows:

	Delinquency Penalty Sec. 291(a)	50% Fraud Penalty Sec. 293(b)	Underestimation Sec. 294 (d)(2)	Failure to File Sec. 294 (d)(1)(a)	Interest on Delinquency Penalties	Total
1951	$4,237.84	$8,975.68	$1,017.08		$55.91	$14,286.51
1952	2,539.28	6,886.08	826.32	1,239.48	54.94	11,546.10
1953	2,726.79	8,128.57	654.43	1,463.15	65.23	13,038.17

B. On March 7, 1961, the Commissioner of Internal Revenue denied and disallowed the claims for refund by notice given in accordance with the provisions of existing Internal Revenue Laws.

XI.

SECOND ASSESSMENT OF DELINQUENCY PENALTY

On March 10, 1961, further assessments of delinquency penalties were made against the plaintiffs for the taxable years as follows:

December 31, 1951	$ 250.00
December 31, 1952	903.76
December 31, 1953	1,337.49

based upon the defendant's contention that the delinquency penalties should be computed without regard to the estimated tax payments shown in paragraph IV herein, made prior to the due date of the income tax returns for 1951, 1952 and 1953. On March 16, 1961, the plaintiffs paid to the defendant these additional penalties.

XII.

SECOND CLAIMS FOR REFUND

A. On April 4, 1961, the plaintiffs filed timely claims for refund for the additional delinquency penalties shown in paragraph XI herein.

B. On August 11, 1961, the Commissioner of Internal Revenue denied and disallowed these claims for refund by notice given in accordance with the provisions of existing Internal Revenue laws.

XIII.

The plaintiff, SIDNEY LEFKOWITZ, was indicted and convicted by a jury for violation of Section 145(b) of the Internal Revenue Code of 1939 for the taxable years, 1951, 1952 and 1953. In introducing a certified copy of the indictment and judgment of conviction against plaintiff, SIDNEY LEFKOWITZ, the defendant contends, based on the doctrine of collateral estoppel, that the plaintiffs are estopped from seeking a refund of the civil fraud penalties and that the indictment and conviction, as a matter of law, conclusively establish fraud.

XIV.

The indictment and conviction are at least prima facie evidence of fraud and being uncontradicted and uncontested are enough from which I can, and do, find that these plaintiffs were guilty of fraud in the submission of the joint returns for 1951-1953. (The legal aspects of this problem are treated under the conclusions of law, infra.)

Conclusions of Law

This court has jurisdiction of the subject matter and parties herein.

II.

The plaintiffs have abandoned claims for refund on the following penalties in the amounts shown:

	1951	1952	1953
Delinquency Penalty	$4,237.84	$2,539.28	$2,726.79
Underestimation Penalty	1,017.08	609.43	-0-
Failure to File Estimated Tax Return Penalty			1,463.15

and therefore are not entitled to a refund of these sums.

III.

The defendant has acknowledged that the penalty in the sum of $1,239.48 for failure to file a timely estimate tax return for the year 1952, was erroneously assessed and collected; therefore, the plaintiffs are entitled to a refund of this amount.

The prior criminal conviction of plaintiff, Sidney Lefkowitz, under § 145(b) of the Internal Revenue Code of 1939 for the taxable years, 1951, 1952 and 1953 is conclusive and binding on the plaintiffs herein, and the plaintiffs are estopped from seeking a refund of the civil fraud penalties assessed pursuant to § 293(b) of the Internal Revenue Code of 1939 for the same taxable years. Although at the time of the denial of the Summary Judgment—which could not have been granted in any event—the court indicated that it was of the opinion that, while the prior conviction after a jury trial was not conclusive, it was prima facie evidence of fraud and it would be admitted for that purpose, further research has convinced the court that although this may (in the absence of statute) the the true rule where the subsequent action is between private parties (18 ALR 2nd 1287, Anno.: Conviction or acquittal as evidence of the facts on which it was based in civil action) it is not so where the United States or some other governmental agency is prosecutor in the criminal action and also plaintiff or defendant in the subsequent civil suit.

While there are no reported income tax cases save in the Tax Court (but cf. *O'Neill v. U. S.*, E.D.N.Y. 198 F.S. 367, 1961), there are cases under civil penalty provisions (*U. S. v. Salvatore*, E.D. PA, 140 F.S. 470, 1956),

injunction proceedings (Local 167 v. U. S., 291 U.S. 293, 1933), etc., following criminal convictions, in which the prior conviction is held to be conclusive. The basis for the exclusionary rule noted above where the civil suit is between private parties is that the criminal conviction is "res inter alios acta"; this basis of course does not exist where the government and criminal defendant are also the parties litigant in the civil suit. It is true that the plaintiff wife in this refund suit was not convicted, but for all that appears she is a mere formal party. The tax returns when finally filed were joint returns. The plaintiffs were, under the law, entitled to avail themselves of the favorable position of a husband and wife filing joint returns, but if there was a fraudulent evasion of this joint tax liability—and a jury has found beyond a reasonable doubt that there was—then, for the purpose of this refund suit that factual finding is binding against these joint taxpayers, even if the government has not seen fit to prosecute the wife. Certainly the conviction is prima facie evidence of such fraud and such evidence is here uncontested and uncontradicted. It would be too easy, under plaintiffs' theory, for a refund plaintiff, convicted of tax evasion, to force relitigation of the fraud issue simply because his wife had signed a joint return and so was a party to the refund suit.

The tax court cases which hold a conviction not to be conclusive (Estate of Slater, ____ T.C. ____, Dec. 25, 733(M) T.C. Memo, 1962-256; Meyer J. Safra, 30 T.C. 1026, Eugene Vassallo, 23 T.C. 656), go back ultimately to *Helvering v. Mitchell* (303 U.S. 391) where the Supreme Court held that an acquittal did not preclude the government from assessing a civil fraud penalty, which assessment had been sustained by the tax court. The distinction

between the two situations is obvious in the light of the difference in the burden of proof in civil and criminal proceedings. Helvering v. Mitchell does not support the tax court's conclusions that the same issues are not involved in the Civil as in the Criminal fraud suit.

V.

The fraud penalty under Section 293(b) of the Internal Revenue Code of 1939 is determined on the basis of the total deficiency existing on the due date of the return, without regard to amounts paid upon the filing of delinquent returns. However, certain amounts were paid with the estimated returns in these years and in arriving at the "deficiency" credit should be given for these amounts. Said amounts appear in Finding #4 and the proper amount of deficiency for each year, to which the 50% fraud penalty applies is as follows:

	Deficiency	Penalty
1951	$16,951.36	$8,475.68
1952	$10,107.11	$5,053.56
1953	$10,907.14	$5,453.57

and plaintiffs are entitled to a refund in the respective years of the following amounts:

1951	$ 500.00	
1952	1,807.52	(Corrects a five dollar overcharge in original penalty)
1953	2,675.00	
	$4,987.25	

VI.

The penalty for substantial underestimation of estimated tax for the year 1953 is properly assessed pursuant to Section 294(d)(2) of the Internal Revenue Code of 1939, where the taxpayer files a delinquent declaration of estimated tax which also substantially underestimates the tax. Therefore, plaintiffs' claim for refund of this penalty for 1953 is denied. (*Stellor v. U. S.*, Ct. Cl., 287 F.2d 588, 1961; *Bryan v. C.I.R.*, 4 C., 281 F.2d 238, 1960)

VII.

The delinquency penalties assessed pursuant to Section 291(a) of the Internal Revenue Code of 1939 apply to plaintiffs' entire tax liability without regard to the estimated tax payments made prior to the due date of the income tax returns. Therefore, plaintiffs' claim to recover the penalties set forth in Finding XI is denied. (*West Virginia Steel Corp. v. C.I.R.*, 34 T.C. 851, 861, 1960).

VIII.

Plaintiffs will submit a final judgment on notice in accordance with these conclusions of law.

Dated at Miami, Florida, this 26th day of December, 1962.

DAVID W. DYER
Chief Judge

[TITLE OMITTED]

JUDGMENT

Filed July 22, 1963, Miami Division, U. S. District Court, Southern District of Florida.

The Court having considered the evidence and the arguments of counsel, and having entered its findings of fact and conclusions of law herein, it is in conformity therewith:

ORDERED: that plaintiffs have judgment against defendant for the principal amount of $6,222.00, with interest thereon at six percent according to law, and that the plaintiffs recover their costs to the extent permitted by law.

Further, the Court hereby certifies that, in performing his official duties involved herein, the defendant had probable cause.

Done in open Court at Miami, Florida, this 19th day of July, 1963.

DAVID W. DYER
United States District Judge

Approved as to form by:
E. DAVID ROSEN
Attorney for Plaintiffs

Approved as to form by:
LAVINIA L. REDD
Asst. United States Attorney

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1963

No. 21094

D. C. Docket No. 11,253-M-DD

LAURIE W. TOMLINSON, District Director of Internal Revenue for the District of Florida,

Appellant-Appellee,

versus

SIDNEY LEFKOWITZ and ROSE LEFKOWITZ,

Appellees-Appellants.

(AND REVERSE TITLE)

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, Chief Judge, BROWN, Circuit Judge, and BREWSTER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, modified and affirmed in accordance with the opinion of this Court; and that this cause be, and it is hereby remanded to the said District Court for the entry of a proper judgment in accordance with said opinion;

It is further ordered and adjudged that the appellees-appellants, Sidney Lefkowitz and Rose Lefkowitz, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

July 13, 1964

Issued as Mandate: Aug. 4, 1964

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

NO. 21094

LAURIE W. TOMLINSON, District Director of Internal Revenue for the District of Florida,

Appellant-appellee,

versus

SIDNEY LEFKOWIT and ROSE LEFKOWITZ,

Appellees-appellants.

Appeals from the United States District Court for the Southern District of Florida.

Before BROWN, Circuit Judge and BREWSTER, District Judge.

ON CONSIDERATION OF THE MOTION of Appellees-appellants to withdraw the judgment issued as mandate in the above numbered and entitled cause, to enable them to apply for and to obtain a writ of certiorari from the Supreme Court of the United States.

IT IS ORDERED that the judgment issued as mandate to the Clerk of the United States District Court at Miami, Florida, on August 4, 1964, be recalled and stayed

to and including September 15, 1964, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within said period there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed.

IT IS FURTHER ORDERED that the Clerk shall issue the judgment as mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the above period unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

(Original Filed August 17, 1964)

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21094

LAURIE W. TOMLINSON, ETC.

Appellant,

SIDNEY LEFKOWITZ and ROSE LEFKOWITZ

Appellee.

ON CONSIDERATION OF THE APPLICATION of the Appellees-appellants in the above numbered and entitled cause for a further stay of the mandate of this Court therein, to enable Appellees-appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is further stayed to and including Nov. 1, 1964, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration

of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ Elbert P. Tuttle
UNITED STATES CIRCUIT JUDGE

Dated: (Original Filed September 8, 1964)